

No. 14,096

IN THE

United States Court of Appeals  
For the Ninth Circuit

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NG YIP YEE,

*Appellant,*

vs.

BRUCE G. BARBER, District Director, Im-  
migration and Naturalization Service,  
San Francisco, California,

*Appellee.*

Appeal from the United States District Court for the  
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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This is an appeal from an order of the Court of the United States District in and for the Northern District of California, Southern Division, dismissing a writ of habeas corpus, filed on behalf of Ng Yip Yee, the detained, and directed against Bruce Barber, District Director of the Immigration and Naturalization Service, San Francisco, California.

The detained is a citizen of the United States, and the natural and legal son of Ng Ah Shaw, who was

born in Seattle, Washington, on 6 September 1886, a citizen of the United States.

The detained made his application before the United States Consul in Canton in the year 1949, for recognition of his United States citizenship, and after investigation by the United States Consul and the Secretary of State, the Passport Division of the State Department, Washington, D.C., recognized the claim of Ng Yip Yee to United States citizenship, and the American Consul at Hong Kong, B.C., was directed to issue, and did issue, a valid passport to Ng Yip Yee on or about about the 1st day of July, 1952.

The detained, Ng Yip Yee, arrived at the Port of San Francisco, on the 27th day of April, 1953, and thereafter the said Ng Yip Yee was unduly detained by the appellee and was refused admittance into the United States. The detained was held incommunicado by the appellee for a period of about several weeks, and upon the filing of a writ of habeas corpus, and administrative proceeding was commenced by the Department of Immigration, on the basis that the detained was an alien, and the passport was taken from the possession of Ng Yip Yee and was thereupon declared invalid.

The detained was not formally charged but was put upon the task of establishing evidence and proving beyond a reasonable doubt his status of citizenship, in a hearing which was objected to by counsel for the detained as being without jurisdiction to hear the matter. Further, the detained was deprived of his

passport and the rights of citizenship, without the due process of a hearing or a trial, and was considered by the Immigration and Naturalization Service as an alien without the United States and has never been informed of reasons for invalidation of his passport.

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### SPECIFICATION OF ERRORS.

#### 1. THE COURT BELOW ERRED IN DISMISSING THE APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS.

Ng Yip Yee was examined and investigated by the Department of State and the United States Consul at Canton and Hong Kong in regard to Ng Yip Yee's claim to United States citizenship.

Ng Yip Yee was required to sustain the burden of proof in establishing this claim to citizenship, and at the instance of the State Department a blood test was submitted to by the applicant and his parent.

Ng Yip Yee further gave testimony and submitted documentary evidence in support of his claim, and thereafter was deemed to have sustained said burden of proof and was thereupon issued by the Consul at Hong Kong, upon instruction by the Passport Division of the Department of State, a valid passport, the partial contents of which are herein set forth from page 2 of Passport of United States, No. 364:

“I, the undersigned (*Consul*) of the United States of America, hereby request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and

protection to *Ng Yip Yee*, a citizen of the United States.”

Ng Yip Yee, having sustained the burden of proof, thereby comes within the meaning and mandate of 22 Code Federal Regulations, sec. 107.3(a), pertinent to the duties of Foreign Service Officers and herein quoted:

“(a) Accept applications for service passports and, when designated to do so by the Secretary of State under authority contained in the act of July 3, 1926, 44 Stat. 887 (22 U.S.C. 211a), grant and issue such passports to American nationals who owe allegiance to the United States in accordance with the provisions of the laws of the United States, with such provisions of Executive Order No. 7856 of March 31, 1938, entitled ‘Rules Governing the Granting and Issuing of Passports in the United States’ (3 F.R. 799) as may be applicable to the issuance of passports abroad, and with such administrative regulations as may be prescribed by the Secretary of State.”

and was recognized as a citizen of the United States by the Consul, who issued a valid passport in accordance and compliance with the regulation hereinabove quoted.

Ng Yip Yee having been issued a valid passport was for all purposes a citizen of the United States, free to travel to the United States and join his family.

The Court held in *U. S. v. Browder*, 113 F. 2d 97:

“A passport certifies that the *person therein described is a citizen of the United States* and



requests for him while abroad, permission to come and go as well as lawful aid and protection, and is a document which from its nature and object is addressed to foreign powers.” (Italics ours.)

Therefore, it is the contention of the appellant that the issuance and possession of a passport by the detained constituted Ng Yip Yee a citizen of the United States. Although the passport of Ng Yip Yee was taken by the Immigration and Naturalization Service upon grounds that it was invalidated by the Secretary of State, Ng Yip Yee could not be considered as having lost his citizenship.

The Court held in *Gillars v. United States*, 182 F. 2d 962:

“In any event, the revocation of a passport, nothing more appearing, does not cause a loss of citizenship or dissolve the obligation of allegiance issuing from citizenship.”

The Court continuing:

“A passport is some though not conclusive evidence of citizenship.”

“It is a valuable and useful documentation, particularly as an aid to travel and as an identification in foreign lands, *but the absence or revocation of a passport does not deprive an American of citizenship.*” (Italics ours.)

The status of citizenship of Ng Yip Yee was determined with formality, evidence, testimony and witnesses, and findings were made by the Secretary of

State and confirmed by the American Consul at Hong Kong that Ng Yip Yee was a citizen and entitled to a United States passport, and as a citizen of the United States the Court below erred in dismissing the appellant's petition for a writ of habeas corpus.

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**2. THE COURT ERRED IN HOLDING THAT NG YIP YEE WAS SUBJECT TO AN ADMINISTRATIVE HEARING.**

The appellee contends that the detained, Ng Yip Yee, is subject to the administrative jurisdiction conferred upon the Attorney General and its agency, the Department of Immigration and Naturalization.

Transcript (pages 9-12, Sec. 235(b) (8 U.S.C. 1225 (b)), Sec. 236(a) (8 U.S.C. 1226 (a)), and Sec. 236(b) (8 U.S.C. 1226 (b)), of the Immigration and Nationality Act of 1952.

These sections are applicable to aliens who are attempting to enter the United States as such aliens, and therefore are applicable to non-resident aliens, the administrative agency of the Immigration and Naturalization Service, under the Attorney General of the United States, being the proper forum for an alien to give evidence, produce witnesses, and be heard in respect to any claim of grounds for entering the United States.

The detained, Ng Yip Yee, poses a different problem than that upon which the appellee contends in respect to the proper forum for an examination and investigation of detained. The appellant contends that

if for any reason on behalf of the security of the nation, or the interests of justice, an investigation or examination should be required of the detained, Ng Yip Yee, then the proper person and administrative agency to investigate or examine the detained is the Secretary of State and his agencies but not the Attorney General and his agencies.

The jurisdiction to examine and investigate citizens of the United States living without the United States is conferred upon the Secretary of State by Act of Congress:

*Immigration and Nationality Act*, Public Law 414, Chapter 477, Sec. 104 (a):

“The Secretary of State shall be charged with the administration and the enforcement of the provisions of this act, and all other immigration and nationality laws relating to (1) the powers, duties and function of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas; (2) the powers, duties and functions of the Bureau of Security and Consular Affairs; and (3) *the determination of nationality of a person not in the United States.*” (Italics ours.)

Ng Yip Yee is not in the United States, and therefore if he must be subject to an administrative hearing or an investigation or any proceeding of whatsoever nature, the Secretary of State is the proper forum and the Attorney General is without jurisdiction to entertain the matter or to detain the citizen, Ng Yip Yee.

3. THE COURT ERRED IN REFUSING TO RECOGNIZE THE RIGHTS OF NG YIP YEE AS A CITIZEN OF THE UNITED STATES.

The passport of the detained, Ng Yip Yee, was invalidated and taken from the detained without a trial or hearing. As a citizen, Ng Yip Yee was entitled to be charged and to be given notice that his passport was invalidated and taken from his possession and that the revocation of his passport without a hearing or a trial was the denial of due process, a right inherent to a citizen of the United States by virtue of the Constitution of the United States.

In *Bauer v. Acheson*, Civ. No. 743-52, 106 Fed. Supp. 445, the Court sitting, 3 justices en banc, considered the taking and summary revocation of a passport, where it was held:

“Secretary of State was without authority to summarily revoke passport, during period for which it was valid, without prior notice or opportunity for hearing, and on valid statement that citizen activities were contrary to best interests of United States, and he was likewise without authority to refuse to renew passport under same circumstances.”

In discussing the question further, the Court in reference to taking a passport without a hearing or notice, stated with reference to 22 U.S.C.A. Sec. 211 (a), that this conduct of the Secretary of State to take up a passport was “A denial of due process clause of Fifth Amendment \* \* \* deprivation of life, liberty or property without due process \* \* \*.”

Continued the Court on page 451:

“We conclude that revocation of the plaintiff’s passport without notice and hearing before revocation, as well as refusal to renew such passport without an opportunity to be heard, was without authority of law.”

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### CONCLUSION.

Therefore, it is the contention of the appellant that a citizen of the United States, Ng Yip Yee, was refused admission to the United States, and that his detention by the Department of Immigration and Naturalization was an unlawful act, provoked without first having charged formally the said Ng Yip Yee with a violation of any laws of the United States or the laws of the respective states.

It is the contention of appellant that the said Ng Yip Yee was the bearer of a valid passport and as such a citizen of the United States, as stated therein was divested of all the rights and privileges pertinent to citizenship, by having his passport summarily invalidated, and debased to the status of a non-resident alien, without notice, hearing or trial.

Lastly, the citizen, Ng Yip Yee, was subjected to an administrative hearing, not a mere routine procedure, of examining any person upon his arrival into the United States, but was given the onerous burden of proof once again to establish the fact that he was a citizen, to the satisfaction of the Department of Im-

migration and Naturalization, who without jurisdiction but with insistence imposed upon Ng Yip Yee an administrative proceeding applicable to an alien, but not to a citizen of the United States.

It is therefore respectfully submitted that the decision of the District Court below be reversed with a direction to discharge the detained, Ng Yip Yee, from the custody of the appellee.

Dated, San Francisco, California,  
December 11, 1953.

Respectfully submitted,

SALVATORE C. J. FUSCO,

*Attorney for Appellant.*